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**IN THE
COURT OF APPEALS OF INDIANA**

REGINALD AKINS,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 18A04-0502-PC-92
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Michael D. Peyton, Special Judge
Cause No. 18C01-0305-FB-13

October 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Reginald Akins (“Akins”) appeals the denial of his petition for post-conviction relief. We affirm.

Issue

In his appeal, Akins raises several issues, which we consolidate and restate as:

- I. Whether the post-conviction court erred in determining that Akins waived 11 claims of error because they were not raised on direct appeal;
- II. Whether Akins presented newly discovered evidence of juror misconduct; and
- III. Whether his appellate lawyer provided ineffective assistance of counsel.

Facts and Procedural History

The facts found by this court in Akins’ direct appeal are as follows:

On July 20, 2001, Tanasha Smith worked as a cashier at a restaurant. At approximately 9:30 p.m., Akins approached the service counter and informed Smith “this is a robbery” and told her to give him the money in the cash register. Tr. p. 148. Akins raised his shirt revealing a gun in the waistband of his pants. Smith gave Akins all of the five-dollar bills and the two or three ten-dollar bills that were in the cash register.

During the robbery, Michael Clifford, a customer, entered the restaurant while his girlfriend waited in the car. Akins showed Clifford the gun in the waistband of his pants and told Clifford to leave the restaurant, which he did. Akins ran out of the restaurant as Clifford was getting back into his car. Clifford followed Akins in his car as Akins ran from the restaurant. Clifford flagged down a police car and returned to the restaurant.

Another police officer, Jason York, saw Akins running out of an alley. After a foot chase, Officer York and Officer Jason Rogers apprehended Akins, who had twelve five dollar bills and three ten dollar bills in his pocket. Clifford immediately identified Akins as the robber.

On July 25, 2001, the State charged Akins with robbery as a Class B felony and later amended the information to include an habitual offender charge.

Akins v. State, No. 18A05-0112-CR-524, slip op. at 3-4 (Ind. Ct. App. Aug. 28, 2002). The trial court appointed a public defender to represent Akins. However, Akins communicated to his attorney that he did not trust him and subsequently filed a Motion to Proceed Pro-Se on August 27, 2001. On August 30, 2001, the trial court conducted a hearing on the pro se motion as well as the public defender's motion to withdraw. At this hearing, Akins again expressed his desire to represent himself and declined the trial court's offer to appoint another public defender. The trial court advised Akins of the advantages and disadvantages of proceeding to trial pro-se, including that Akins would be required to follow the same legal rules and procedures by which attorneys are bound. The trial court specifically pointed out to Akins, twice, that if the result of his pro se representation was undesirable that Akins could not complain that he, Akins, was an ineffective attorney. After concluding that Akins understood his right to counsel, the dangers and disadvantages of representing himself, and that Akins voluntarily waived his right to counsel, the trial court appointed standby counsel to assist Akins. Additionally, Akins signed and filed a written waiver of counsel five days after the hearing. At the final pre-trial conference, the trial court re-advised Akins about proceeding pro se, and Akins reaffirmed his desire to represent himself at his trial.

Voir dire was conducted on October 3, 2001. Prospective juror Deborah Malitz ("Malitz") responded on her questionnaire that she was neither related to nor close friends with a law enforcement officer. Malitz later testified at the post-conviction hearing that

Brian Lipscomb, a captain of the Delaware County Sheriff's Department, used to be her neighbor and was a family friend, but she did not consider him a close friend because she never socialized with him.

Resulting from an order after a pre-trial evidentiary hearing, the identification of Akins by Tanasha Smith as the man who robbed her and mention of the police line-up were suppressed. During her testimony at trial, Smith pointed at Akins, but did not orally identify him as the robber. After her direct testimony, Akins requested a bench conference to make a motion for a mistrial, presumably on the basis that Smith pointed at him during her testimony in violation of the pre-trial order. The trial court took the motion under advisement and later denied the motion based on Akins' cross-examination of Smith, which included questions as to whether Akins was indeed the robber and revealing that Smith had not been able to pick Akins out of a 6-man line-up.

At the conclusion of the trial, the jury found Akins guilty as charged, and the trial court sentenced him to twenty-four years in prison.

On direct appeal, Akins was represented by a public defender. Akins wrote several letters to his appellate attorney requesting various issues be raised on appeal. Akins' appellate attorney reviewed the transcript and on appeal only raised the issue of whether alleged prosecutorial misconduct resulted in fundamental error. Akins, slip op. at 2-3. His attorney also created a memorandum, which he provided to Akins, as to why he was not raising the other requested issues. This court affirmed Akins' conviction and sentence on direct appeal. Id.

In 2003, Akins filed a pro se petition for post-conviction relief. After amendments, Akins raised numerous claims including eleven claims of error that allegedly took place at trial and a claim of ineffective assistance of appellate counsel. At the conclusion of the two-day evidentiary hearing, the post-conviction court issued findings of fact and conclusions of law and denied relief. The post-conviction court addressed eleven claims of trial error and held that they were not available on post-conviction review because Akins had waived them by not raising them on direct appeal. On the issue of ineffective assistance of appellate counsel, the post-conviction court found that Akins failed to sustain his burden of proof to prevail on this claim. Akins now appeals.

Discussion

Standard of Review

Post-conviction procedures do not afford defendants the opportunity for a “super-appeal.” Benefiel v. State, 716 N.E.2d 906, 911 (Ind. 1999), cert. denied. Rather, these actions are “special, quasi-civil remedies whereby a party can present an error which, for various reasons, was not available or known at the time of the original trial or appeal.” Berry v. State, 483 N.E.2d 1369, 1373 (Ind. 1985). The petitioner must establish the grounds for post-conviction relief by a preponderance of the evidence. Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993), reh’g denied. To prevail on appeal, the petitioner must demonstrate that the evidence as a whole “leads unerringly and unmistakably to a decision opposite that reached by the trial court.” Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). We will disturb the decision of a post-conviction court only where the evidence is uncontradicted and

leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998), reh’g denied, cert. denied.

Upon reviewing a petition for post-conviction relief, we may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court. Culvahouse v. State, 819 N.E.2d 857, 860 (Ind. Ct. App. 2004), trans. denied. Furthermore, our supreme court has emphasized that “[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

Analysis

On appeal, Akins contends that the post-conviction trial court erred in denying him relief. Akins raises numerous issues in his brief, but we consolidate them to whether he waived issues presented to the post-conviction court that were available but not raised on direct appeal, whether there was juror misconduct, and whether he received ineffective assistance of appellate counsel.¹

I. Waiver of Eleven Issues

First, Akins argues that the post-conviction court erred in determining that Akins

¹ Both parties address whether Akins’ pre-trial counsel was ineffective. However, the order from the post-conviction court does not list this as an issue. Additionally, the post-conviction court did not allow Akins to develop testimony on this issue due to not finding it as a point raised in the petition. The petition and its amendments only list this point as an issue not raised by appellate counsel and not set out as a separate basis for relief. Regardless, Akins admits in his brief that the work of his pre-trial counsel was effective and competent when judged by the Strickland standard.

waived the eleven issues² because he had not raised them on direct appeal. His basis for this is basically rooted in his argument for ineffective assistance of appellate counsel: these issues had not been brought on direct appeal due to his appellate attorney not submitting to the insistence by Akins to raise these issues.

If an issue was known and available on direct appeal but was not raised, it is waived. Trueblood v. State, 715 N.E.2d 1242, 1248 (Ind. 1999), reh’g denied, cert. denied. If the issue was not raised on direct appeal, these contentions may be properly presented in support of a claim of ineffective assistance of appellate counsel. Id. Post-conviction counsel run the risk of waiving available claims of ineffectiveness by presenting such claims as free-standing claims. Id.

Because Akins did not bring these claims on direct appeal, he has waived them.³ However, one of these eleven issues, whether there was juror misconduct, was not waived because the supporting information was discovered after the direct appeal. This type of claim is permitted under PC Rule 1(a)(4) as evidence of material facts not previously presented and heard. We address this issue separately.

² The eleven issues are: whether petitioner knowingly, voluntarily, and intelligently waived his right to counsel; whether testimony in violation of the Motion to Suppress warranted a mistrial; whether a police line-up resulted in a violation of Petitioner’s constitutional rights; whether there was a lack of probable cause to arrest Petitioner; whether the appointment of standby counsel denied Petitioner a fair trial; whether the trial transcript contained errors and omissions that denied Petitioner meaningful appellate review; whether the cumulative effect of the events at trial fatally undermine its fundamental fairness or the accuracy of the verdict; whether there was juror misconduct; whether there was prosecutorial misconduct; and whether the granting of Petitioner’s Motion to Proceed Pro Se denied Petitioner a fair trial.

³ It may appear that another one of the issues, whether appointment of standby counsel denied Akins a fair trial, would not be waived because it is essentially a claim of ineffective assistance of trial counsel. However, when a defendant proceeds pro se, he waives his right to allege a Sixth Amendment violation with respect to his standby counsel’s adequacy because the defendant is truly serving as the lawyer. Carter v. State, 512 N.E.2d 158, 163-64 (Ind. 1987). Neither can a defendant claim he was an ineffective lawyer. Id.

II. Juror Misconduct

Akins claims that juror Malitz lied on her juror questionnaire when she responded that she was neither related to nor a close friend of a law enforcement officer.

Whether a new trial is warranted due to juror deceit during voir dire or on jury questionnaires is determined by a two-part test. State v. Dye, 784 N.E.2d 469, 472 (Ind. 2003). First, a defendant must demonstrate that a juror failed to honestly answer a material question. Id. Second, the correct response must have provided a valid basis for a challenge for cause. Id. The test applies equally to deliberate concealment and to innocent non-disclosure. Id.

The first part of this test, as applied to this case, poses the question of whether juror Malitz's negative response was not an honest answer in light of her being the neighbor and family friend of a captain of the Delaware County Sheriff's Department. Before we reach for a dictionary to decipher the meaning of a *close* friend, we can look to the second part of this test to conclude that a new trial is not warranted.

Indiana Code Section 35-37-1-5 enumerates the bases of challenges for cause; this list does not include being acquainted with a law enforcement officer. An argument could be made that a close relationship between a juror and law enforcement officer could make the potential juror biased or prejudiced against the defendant, but Malitz testified at the post-conviction trial that she never socialized with the officer. This is not a close enough relationship to sustain such an argument.

III. Ineffective Assistance of Counsel

Finally, Akins argues that the post-conviction court erred when it held that Akins received effective assistance of appellate counsel. He challenges the ruling based on his appellate counsel's failure to raise three issues on direct appeal: waiver of his right to trial counsel, juror misconduct, and the denial of his motion for mistrial.

A claim of ineffective counsel must satisfy the two components set out in Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the petitioner must show prejudice: a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Our supreme court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to appeal, (2) failing to raise issues, and (3) failing to present issues adequately. Bieghler v. State, 690 N.E.2d 188, 193-95 (Ind. 1997), reh'g denied, cert. denied. This appeal fits squarely within the second category. Under this analysis, we consider the totality of an attorney's performance to determine whether the client received constitutionally adequate representation. Id. at 194. Appellate counsel's performance, as to the selection and presentation of issues, is presumed to be adequate unless found unquestionably unreasonable considering the information available in the trial record or otherwise known to appellate counsel. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000), reh'g denied, cert. denied. A defendant may establish that the performance of his

appellate counsel was deficient where counsel failed to present a significant and obvious issue for reasons not explainable by any strategic decision. Id.

On appeal, Akins argues only three issues: (1) waiver of counsel; (2) juror misconduct; and (3) Smith's in-court identification of him as the robber in violation of a pre-trial order. We address each issue in turn.

A. Waiver of Counsel

First, Akins contends that his appellate counsel should have raised the issue of whether he knowingly, intelligently, and voluntarily waived his right to counsel.

The Sixth Amendment to the U.S. Constitution and Article I, Section 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003). When a criminal defendant waives this right and elects to proceed pro se, the trial court must determine whether the waiver was knowing, intelligent, and voluntary. Id. To determine whether waiver was knowing and intelligent, four factors are to be considered: (1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to proceed pro se. Poynter v. State, 749 N.E.2d 1122, 1127-29 (Ind. 2001).

The Court of Appeals previously suggested guidelines for a trial court in advising a defendant when he considers self-representation:

(1) The defendant should know the nature of the charges against him, the possibility that there may be lesser included offenses, and the possibility of the defenses and

mitigating circumstances; (2) the defendant should be aware that self representation is almost always unwise, that he may conduct a defense which is to his own detriment, that he will receive no special treatment from the court and will have to abide by the same standards as an attorney, and that the State will be represented by experienced legal counsel; (3) the defendant should be instructed that an attorney has skills and expertise in preparing for and presenting a proper defense; and (4) the trial court should inquire into the defendant's educational background, familiarity with legal procedures and rules of evidence and mental capacity.

Dowell v. State, 557 N.E.2d 1063, 1066-67 (Ind. Ct. App. 1990), trans. denied, cert. denied.

These guidelines do not constitute a rigid mandate of specific inquiries a trial court must make. Leonard v. State, 579 N.E.2d 1294, 1296 (Ind. 1991). Instead, it is sufficient for the trial court to acquaint the defendant with the advantages to attorney representation and the drawbacks of self-representation. Id.

Upon his review of the record, Akins' appellate counsel concluded, "the Record is clear that Akins requested to represent himself." PCR State's Ex. 1. In support of this conclusion, the memorandum of the appellate counsel cites a "Notice to Court" that is handwritten by Akins, an order of the trial court recognizing the Motion to Proceed Pro se filed by Akins, the Waiver of Attorney signed by Akins, and the trial court order accepting the signed waiver, which all evidence Akins' voluntary decision to represent himself. Id. See Trial Appendix at 51, 57, 62, and 64. Additionally, his appellate counsel verified the record reflected that the trial court used the guidelines in Dowell to caution Akins in his decision to proceed without counsel. Id. See Tr. 16-30. Based on this evidence and numerous other portions of the record, the appellate counsel was not unreasonable for not raising this issue on appeal because the record reflects that Akins knowingly and intelligently waived his right to counsel.

B. Juror Misconduct

Second, Akins claims that his appellate counsel should have raised the issue of juror misconduct. However, the foundational information that juror Malitz knew a captain of the Delaware County Sheriff's Department was not discovered until this court had already rendered its decision, so the time in which his appellate counsel could have raised such an issue had already long since passed. Compare PCR Pet. Ex. U and Akins, slip op. at 1.

C. In-Court Identification/Motion for Mistrial

Finally, Akins suggests that his appellate counsel should have challenged the trial court's denial of his motion for mistrial based on Smith's nonverbal in-court identification of Akins as the robber. The State does not contest that Smith pointed at Akins when she testified as to the description of the robber and that Akins objected without explanation. However, the trial court immediately sustained the objection and instructed the witness to describe the robber's appearance. At the end of Smith's direct testimony, Akins moved for a mistrial.

After reviewing this testimony and the cross-examination by Akins, his appellate counsel concluded based on Santonelli v. State, 743 N.E.2d 1281 (Ind. Ct. App. 2001), trans. denied, that the trial judge correctly denied the motion for mistrial because in his cross-examination of Smith, Akins went beyond merely meeting and responding to Smith pointing at him during her testimony. Furthermore, counsel went further in stating that even if Smith's identification of Akins was improper, it was harmless because it was cumulative of other testimony that identified Akins as the robber. We agree with the second conclusion.

A mistrial is an extreme remedy warranted only when no other curative measure will rectify the circumstances. Harris v. State, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005). The grant of a mistrial is a determination within the discretion of the trial court, and will be reversed only for an abuse of discretion. Id. Because it is in the best position to gauge the circumstances and the probable impact on the jury, we give great deference to the decision of the trial court. Id. To prevail on appeal from the denial of a motion for mistrial, the defendant must prove that the questioned event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Id. The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision. Id.

Error in the admission of evidence may be harmless when a conviction is otherwise supported by independent evidence. Hollen v. State, 740 N.E.2d 149 (Ind. Ct. App. 2000), vacated on other grounds by 761 N.E.2d 398 (Ind. 2000). Evidentiary errors may also be harmless when the evidence in question is merely cumulative of evidence admitted elsewhere. Id.

The two witnesses testifying after Smith also identified Akins as the robber, so the improper identification by Smith was harmless because it was cumulative of the other testimony identifying Akins as the robber. Therefore, Akins has not demonstrated that he was prejudiced by his appellate counsel not raising the denial of his motion for mistrial on direct appeal.

Based on the above analysis of the issues not raised by Akins' appellate counsel,

Akins has not met the requisite burden of proof to succeed on this claim of ineffective assistance of appellate counsel.

Conclusion

In conclusion, Akins waived ten of the eleven claims of trial error by failing to raise these issues on direct appeal. The eleventh issue of juror misconduct was available for post-conviction review because the information was discovered after the direct appeal. However, there was no juror misconduct, because the questionnaire answer of the juror would not support a challenge for cause. Finally, his appellate counsel was not ineffective for failing to raise the issues of waiver of counsel, juror misconduct, and denial of the motion for mistrial. Therefore, the post-conviction court properly denied the petition of Akins for post-conviction relief.

Affirmed.

RILEY, J., and MAY, J., concur.